

STATE OF MICHIGAN  
COURT OF APPEALS

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DEBRA WEIDER,

Plaintiff-Appellee,

v

CHERYL LYNN MITCHELL,

Defendant-Appellant.

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UNPUBLISHED

July 13, 2006

No. 265886

Wayne Circuit Court

LC No. 04-435915-NI

Before: Kelly, P.J., and Markey and Meter, JJ.

KELLY, P.J. (*dissenting*).

I respectfully dissent. Because plaintiff failed to present evidence to create a genuine issue of material fact, the trial court erred in denying defendant's motion for summary disposition. Rather than vacating and remanding, I would reverse.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). As our Supreme Court stated in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996),

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [Citations omitted.]

On the basis of the record evidence, I agree with defendant that the trial court should have granted her motion for summary disposition. In plaintiff's deposition testimony, she asserted that her injury precludes her from numerous sports, gardening, and cleaning activities

that require bending, lifting, and reaching. Plaintiff also testified that, after she returned to work, she resigned within six weeks to take another position that paid slightly less, but had shorter hours and required less physical exertion. But plaintiff did not present or identify any documentation signed by a physician restricting her activities. As properly noted by the majority, because plaintiff's limitations were not imposed by a physician or even a physical therapist, plaintiff has not shown that her limitations are other than self-imposed. A plaintiff's "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain" do not establish a residual impairment constituting a serious impairment of a body function. *Kreiner v Fischer*, 471 Mich 109, 133 n 17; 683 NW2d 611 (2004).

Because plaintiff failed to present documentary evidence establishing the existence of a material factual dispute in response to defendant's motion, I would reverse.

/s/ Kirsten Frank Kelly